BRF225

91-700

NO. _____

Supreme Court, U.S.
FILED
OCT 24 1991
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

TEODORA OLIVAREZ,
PETITIONER

VS.

UNITED STATES OF AMERICA,
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the general jury verdict of guilty against a single defendant violates due process or the Sixth Amendment right to a jury trial under a substantive aid or abet count with "four conjunctive proscribed acts and theories" of criminal liability where a general verdict renders it impossible to say whether the defendant was convicted by the jury based unanimously on a proscribed act as to which the evidence was insufficient as a matter of law (anyone causing the bank to fail to file a CTR) or based unanimously on any one of the remaining three proscribed acts, even though the Government sought conviction during jury argument under all four theories, and the trial evidence can not constitutionally be viewed in the light most favorable to the jury verdict in resolving this issue.

LIST OF ALL PARTIES

At the United States Court of Appeals of the Fifth Circuit, the parties were: appellant-defendant Teodora Olivarez and appellee-plaintiff the United States of America.

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To The Honorable Supreme Court:

Teodora Olivarez, petitioner files this petition for certiorari.

OPINION BELOW

United States v. Olivarez, 940 F.2d 656 (CA5 No. 90-2826 7/25/91) (Table) is the unpublished opinion of which review is sought in this Court. That opinion is reproduced in the Appendix to this petition. See A3-12.[1]

JURISDICTIONAL STATEMENT

The opinion and judgment of the Fifth Circuit Court of Appeals sought to be reviewed were dated and entered July 25, 1991. Under 28 U.S.C. 1291, that Court of Appeals had jurisdiction over this case. On August 21, 1991, the Court of Appeals treated petitioner's timely filed

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[1] Appendix citations will be to its pages as "A____".

suggestion for rehearing en banc as a petition for panel rehearing and denied it. The statutory provision believed to confer jurisdiction on this Supreme Court to review this case is 28 U.S.C. 1254(1). Within the 89 day period following July 25, 1991, this petition was timely mailed for filing by the Clerk of this Supreme Court.

STATUTES INVOLVED

The Defendant was convicted of violation of 18 U.S.C. 2 and 31 U.S.C. 5324(1) or (3).

18 U.S.C. 2, Principals reads:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

31 U.S.C. 5324, Structuring transactions to evade reporting requirement prohibited, reads:

> No person shall for the purpose of evading the reporting requirements of section 5313(a) with respect to such transaction—
>
> (1) cause or attempt to cause a domestic financial institution to fail to file a report required under section 5313(a);
>
> (2) cause or attempt to cause a domestic financial institution to file a report required under section 5313(a) that contains a material omission or misstatement of fact; or
>
> (3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

CONSTITUTIONAL PROVISIONS

This case concerns the constitutionally secured right to due process of law under Amendment V, and the constitutionally secured right to a jury trial under Amendment VI.

Amendment V (1791) reads:

No person shall be held to answer for a capital, or otherwise infamous crime, unless a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI (1791) reads:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of their State and District wherein the crime shall have been committed, which District shall have been committed, which District shall have been previously ascertained by a law, and to be informed of the nature and cause of the accusation; to be confronted by the Witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the assistance of Counsel for his defense.

STATEMENT OF THE CASE

This is a criminal case where the district court had jurisdiction under 18 U.S.C. 3231. On May 29, 1991, Petitioner Teodora Olivarez was charged in a one count indictment. It alleged that she had violated, either in her own right or as an aider and abettor, Title 31 U.S.C. 5324(1) and (3). The first theory of alleged criminal liability were the conjunctive allegations, inter alia, that Petitioner caused and attempted to cause the First National Bank of Rio Grande City of Texas ("the bank") to fail to file the currency transaction report ("CTR") required under 31 U.S.C. 5313(a).

The second theory of alleged criminal liability were the conjunctive allegations, that Petitioner caused and attempted to cause, structure, attempt to structure and assist in structuring a

transaction with "the bank" by exchanging $18,000 worth of $5.00 bills for $18,000 worth of $100.00 bills by structuring the transaction by dividing the exchange into two exchanges of $9,000 each.

On July 10, 1990, Petitioner was tried by a jury, which found her "guilty ... as charged in the indictment."

On September 11, 1990, the trial court imposed a sentence of imprisonment for twelve (12) months and one (1) day. Upon "Defendant's Motion for Release and Continuation of the Same Bail Pending Appeal, " the trial court granted the same on September 28, 1990, and so Petitioner has remained free under the conditions of her initial bond. However, on October 21, 1991, the trial court denied "Defendant's Verified Motion To Remain on Bail Pending United States Supreme Court's Action on Petition for Certiorari" and "Olivarez'

Supplemental Motion To Stay Execution of Sentence and Application for Release Pending Certiorari from a Judgment Affirming the Judgment of Conviction." Under the trial court's oral order of October 21, 1991, Petitioner is to voluntary surrender herself into custody by noon on November 4, 1991.

It is from that conviction, sentence and the affirmance of the United States Court of Appeals for the Fifth Circuit that Petitioner now seeks a Writ of Certiorari.

The Fifth Circuit Panel composed of Judges Politz, Davis and Barksdale, affirmed Petitioner's conviction effectively holding "it is almost certain" that the jury did not base its general verdict upon an insufficient theory (A9), after succintly summing up the evidence as follows (A4-5):

> "Accompanied by her mother Olivarez entered a bank and offered to pay a bank officer a commission on a monetary exchange if the bank would not file a Currency Transaction Report (CTR). The officer refused. Olivarez then went to a bank teller and exchanged $9,000 in five-dollar bills for an equivalent sum in hundred-dollar bills. Olivarez told the teller that her mother had nine thousand additional dollars to exchange. Olivarez's mother left the bank and returned with the cash. The teller explained to Olivarez that because the exchange was for more than $10,000 a CTR must be completed. Olivarez claimed not to have identification and insisted that the bank officer had condoned the transaction without a CTR. Olivarez placed the $18,000 in her purse. The bank filed a CTR for the transaction."

Petitioner at the Fifth Circuit argued in this case in her brief at pages 7-8 and 10-13 and citing Yates, Stromberg and Meriwether, also argued in her reply brief at pages 3-5, that the allegations in the indictment's single count go to various proscribed acts within two

entirely and distinct statutory theories of criminal liability. Petitioner asserted there in the Fifth Circuit that proof on the criminality theory that Petitioner structured or attempted to structure does not legally or factually here encompass proof of the criminality theory Petitioner caused or attempted to cause the bank not to file a CTR. There in the Fifth Circuit Petitioner asked two questions: "Which did the jury find? Who knows?" The Fifth Circuit noted (A9): "Government counsel claimed and witnesses testified to the jury without challenges that a CTR was filed. There was no evidence to the contrary." Thus, Petitioner asserted in the Fifth Circuit that due process was violated because the proof is legally insufficient as to the separate jury charged proscribed act that Petitioner caused the bank to fail to file

a CTR, and because it cannot be determined from the face of the general verdict whether guilt was based upon the proscribed acts of structuring or attempting to structure under section 5324(3) or the proscribed acts of causing or attempting to cause the bank to fail to file a CTR under section 5324(1).

Nevertheless, the Fifth Circuit held (A9): "In this case, it is almost certain that the jury did not find that Olivarez caused a failure to file a CTR."

The Fifth Circuit also held (A10): "A fair reading of the trial record does not reveal any cause for confusion. There is no suggestion that the verdict was not unanimous."

Petitioner submits the Fifth Circuit was not totally correct in stating (A10): "There is no suggestion that the verdict was not unanimous." There at page 4 of

her reply brief, Petitioner's appellate attorney had argued the altered unanimity issue as follows:

> In the case at bar, contrary to those that would admit of a single conceptual grouping, the Government's allegations go to acts within two entirely separate and distinct theories of criminal liability. Stated another way, proof of the theory that Appellant caused or attempted to cause the bank not to file a CTR, would not necessarily encompass proof of "structuring." Which did the jury find? Who knows?

The Fifth Circuit said (A6):

> Olivarez contends that her conviction is constitutionally infirm because there is insufficient evidence to support one of the possible offenses recited to the jury. The jury instruction included in its list of criminal offenses the act of causing a financial institution to fail to file a CTR. The bank did, however, file a CTR. Olivarez concedes that the trial evidence was sufficient to support other offenses in the indictment.

Petitioner submits the Fifth Circuit was incorrect in stating (A6): "Olivarez concedes that the trial evidence was sufficient to support other offenses in the indictment." There at page 7 of her brief, Petitioner's appellate counsel had candidly only stated to the Fifth Circuit:

> "Viewed in the light most favorable to the jury's verdict, the evidence was sufficient to sustain the jury's verdict as to a Subsec. (3) theory [i.e., carving up a single transaction into two less than $10,000.00 transactions].

However, at page 8 of her brief, Petitioner reminded the Fifth Circuit:

> Appellant never contested her factual guilt in the sense of taking the position that she did not engage in the conduct. Rather, her defensive testimony was that she owned half of the money and did not think that the two transactions would, could or should be considered as a single transaction that would require a report, especially since she had been given assurance otherwise from the bank officer, Mr. Moreno.

After the close of the evidence and the prosecutor's opening jury argument (A36-42), the district court at length inquired of the prosecutor since the court was unsure which theory was being relied upon by the Government (A42-55). In its entire jury argument, the Government ultimately expressly relied for conviction on all disjunctive theories [structuring or attempting to structure (A38, 41-42, 57, 60); aiding or abetting (A38); causing the bank to fail to file a CTR (A60); and attempt to cause the bank to fail to file a CTR (A41-42, 57, 60-61)] and each of the four proscribed acts of appellant as submitted in the disjunctive in the trial court's jury instructions (A18-23) along with an aid or abet instruction (A24-27).

Petitioner submits that from this case's two Jury Notes, the district court was put on notice of the jury's count one

problem of unanimously analyzing the guilt of Petitioner, who in effect testified she was not guilty, of a crime of "one or two bank tellers" (Criselda Sepulveda and Thelma Garcia) as the alleged structuring or attempted structuring crime under 31 U.S.C. 5324(3) as well as the same count's alleged crime under 31 U.S.C. 5324(1) of causing or attempting to cause the bank to fail to file a required CTR by attempting to bribe its employee Elmo Moreno and/or by misleading its employee Criselda Sepulveda as to instructions from Elmo Moreno that no CTR needed to be filed.

After the district court charged the jury, Petitioner's trial counsel renewed his prior objection to the phrasing of the different charges in the disjunctive rather than in the conjunctive as described in the indictment (A34, A42 to A55).

After the jury had been deliberating a while, the district court responded to Jury Note No. 1 by having read Petitioner's testimony that she made one transaction with one bank teller and her mother went to another bank teller (A63 to A69).

Then before the jury left for the day, the district court responded to Jury Note No. 2 where the jury had two questions (A69, 68-72):

> The first one, during which time was Thelma Garcia notified about the transaction, was it during the second transaction or after it was made and Mrs. Olivarez had left the building, question mark.

The next day the jury deliberated more and then returned its guilty verdict where trial testimony had lasted no more than two hours (A69-70).

REASON FOR ALLOWANCE OF THE WRIT

Violation of Right to Due Process and Jury Trial

This Supreme Court should exercise its discretion in allowing issuance of a Writ of Certiorari in this case because the Fifth Circuit Court of Appeals has rendered a decision in conflict with the decisions of other Federal Courts of Appeal on the same matter.

This is a constitutionally confused area, which needs to be resolved by the Supreme Court deciding Petitioner's question presented. That question will not be resolved by the Supreme Court's forthcoming decision in Griffin v. United States, No. 90-6352, which was orally argued during the week of October 7, 1991.

Petitioner submits her judgment of conviction should be reversed because her conviction cannot be said to be based on a jury verdict which is clearly unanimous as

to any one proscribed act of Petitioner, since the Government argued for conviction as charged in the single count indictment brought under the four distinct acts of theories of criminality prohibited by 31 U.S.C. 5324(1) and (3). The chances are too high that three jurors voted guilty for structuring, and three jurors voted guilty for aiding and abetting through Petitioner's mother the caused or attempted structuring, while three more jurors voted guilty since Petitioner attempted to cause the bank to not file a CTR by bribery of bank officer Elmo Moreno, although the last three jurors voted guilty since Petitioner attempted to cause the bank to fail to file a CTR by refusing to identify herself or her mother to bank teller Criselda Sepulveda and/or by misleading Sepulveda, saying Moreno said that no CTR was due.

Observing that there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict, Justice Blackmun recently footnoted in his separate concurrence in McKoy v. North Carolina, 494 U.S. 433, 110 S.Ct. 1227, 1237 n. 5, 108 L.Ed.2d 369 (1990):

> There is one significant exception to this principle, but it does not support the dissent's position. In federal criminal prosecutions, where a unanimous verdict is required, the Courts of Appeals are in general agreement that "[u]nanimity ... means more than a conclusory agreement that the defendant has violated the statute in question; there is a requirement of substantial agreement as to the principal factual elements underlying a specified offense." United States v. Ferris, 719 F.2d 1405, 1407 (CA9 1983). Accord, United States v. Duncan, 850 F.2d 1104, 1110-1115 (CA6 1988); United States v. Beros, 833 F.2d 455, 461 (CA3 1987); United States v. Schiff, 801 F.2d 108, 114 (1986), cert. denied, 480 U.S. 945, 107 S.Ct. 1603, 94 L.Ed.2d 789 (1987); United States v.

Gipson, 553 F.2d 453, 456-459 (CA5 1977). But see United States v. Bouquett, 820 F.2d 165, 169 (CA6 1987) (questioned in Duncan, 850 F.2d, at 1112-1113). This rule does not require that each bit of evidence be unanimously credited or entirely discarded, but it does require unanimous agreement as to the nature of the defendant's violation, not simply the fact that a violation has occurred. The North Carolina requirement that aggravating circumstances be found unanimously therefore has some analogue, albeit imperfect, in another area of the law. This principle is a protection for the defendant, however; its premise is that "[r]equiring the vote of twelve jurors to convict a defendant does little to ensure that his right to a unanimous verdict is protected unless this prerequisite of jury consensus as to the defendant's course of action is also required." Gipson, 553 F.2d. at 458. There is no analogous principle requiring that jurors voting to acquit must agree upon the basis for their reasonable doubt.

In United States v. Echeverry, 719 F.2d 974, 975 (CA9 1983) (On Rehearing), the court denied the government's rehearing petition after reversal, saying:

> When it appears, however, that there is a genuine possibility of jury confusion or that a conviction may occur as the result of different jurors concluding that the defendant committed different acts, the general unanimity instruction does not suffice. To correct any potential confusion in such a case, the trial judge must augment the general instruction to ensure the jury understands its duty to unanimously agree to a particular set of facts. Such circumstances are certainly present in this case. The jury's written questions indicated their confusion concerning multiple conspiracies and should have alerted the trial judge to the potential for a nonunanimous verdict. See United States v. Mastelotto, 717 F.2d 1238 (9th Cir.1983) (variance between the proof at trial and the indictment in a case involving multiple schemes to defraud presents such a potential for juror confusion that special unanimity instructions are required).
>
> The Petition for rehearing is denied.

In United States v. Meriwether, 440 F.2d 753, 757 (CA5 1971), a prosecution on a three count indictment charging willfully attempting to evade and defeat

defendant's and his wife's federal income tax for several years, the court reversed saying:

> There is no way to be certain upon which method of proof the jury based its verdict of guilty. On the next worth method the proof was insufficient as to the net worth of Mrs. Meriwether. The jury, if properly instructed, might well have failed to find any sufficient corroboration of Meriwether's cash on hand. In the light of the emphasis placed on net worth in the district attorney's argument and in the Court's charge, the jury may well have returned the verdict convicting Meriwether upon inadequate net worth proof and inadequate instructions. The judgment must therefore be reversed and the case remanded.
>
> Reversed and remanded.

In United States v. Duncan, 850 F.2d 1104, 1108-1115 (CA6 1988), a false statement tax case, the court reversed and remanded the cause after an exhaustive discussion on the trial court's sometimes duty to instruct the jury of the necessity

for a unanimous verdict as to any one part of a multipart count of an indictment or as to charged statutory alternatives when "'discrete acts are alleged in a single count, such as charges of separate false statements, any one of which is sufficient to convict.'" Id. at 1113. There, the court of appeals said, id. at 1105, 1114-1115:

> In this false statement tax case, defendant Duncan and defendant Downing, who was Duncan's tax preparer, were acquitted for the tax year 1981 and convicted for the year 1982 of violating 26 U.S.C. §§ 7206(1) and 7206(2), which prohibit the making and the preparation of a tax return containing a false statement as to a material matter. The 1982 tax return in question contained two separate and distinct statements which the indictment alleged were false. The structure of the indictment and ambiguous instructions given by the judge in response to a question from the jury combined to create a substantial likelihood of jury confusion, with the result that it is unclear which of the statements

the jurors found to be false and whether their verdict on either was unanimous.

*****

In the context of this case, the jury's request for clarification manifested just such a tangible risk of jury confusion and of nonunanimity on a necessary element of the offense charged. Presented with this risk, the trial judge unfortunately appears not to have appreciated the thrust of the jurors' problem. Instead, the judge merely restated his ruling on materiality and imparted the ambiguous advise that the jurors should convict "if you are convinced [that the] return was false with respect to either one of these matters." This instruction did not deter the jury from arriving at a composite verdict.

It seems obvious that the District Court's error in instruction was not harmless. This was a conscientious jury that had deliberated for parts of two days before it asked its questions, deliberated for several more hours after receiving the answers before pronouncing itself dead-locked, and then took several more hours into the next day before reaching its verdicts. The jury obviously wrestled with its

problems and returned with a discriminating verdict that acquitted on some counts and convicted on others. Although we do not look behind the verdict reached, surely there is a heightened risk in such circumstances of a composite, nonunanimous verdict. Where there is a reasonable possibility that a jury has relied on an "unconstitutional understanding of the law" in reaching a guilty verdict, that verdict must be set aside. Francis v. Franklin, 471 U.S. 307, 322 n. 8, 105 S.Ct. 1965, 1975 n. 8, 85 L.Ed.2d 344 (1985).

A question from a deliberating jury often represents a pivotal moment in a criminal trial. Particularly in a close case like this, a trial judge has a "duty of special care" when responding to a request for "further light on a vital issue" from the foreperson of a confused jury. As Justice Frankfurter said:

> Particularly in a criminal trial, the judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptionable and unilluminating abstract charge.... When a jury

> makes explicit its difficulties a trial judge should clear them away with concrete accuracy.
>
> Bollenbach v. United States, 326 U.S. 607, 612-13, 66 S.Ct. 402, 405, 90 L.Ed. 350 (1946).

In United States v. Beros, 833 F.2d 455 (CA3 1987), an appeal from conviction of "embezzling, stealing, abstracting or converting to his own use" funds of a particular union, the court of appeals reversed because by not acceding to defendant's request for specific instructions that to convict the jury must unanimously agree upon a particular act supporting defendant's guilt under a particular theory of criminality, the trial court committed reversible error since there is a significant possibility this error may have resulted in a non-unanimous verdict in violation of the Sixth Amendment. The court of appeals reasoned, saying, id. at 461-462:

In substance, the analytical problem presented by this case is whether the district court's use of the phrase "method, mode or manner" of violating the law provided sufficiently specific guidance to assure that, in fact, all members of the jury were unanimous on the same act or acts of illegality. Counts 3 and 5 each allege four separate and distinct theories of criminal activity: embezzlement, abstraction, stealing and conversion. Each count also enumerates several acts upon which a finding of guilty could be predicated. It is plainly not enough that the jury was unanimous in finding one theory on which it believed Beros culpable. The jury needed also to match that finding to another unanimous finding regarding a particular act.

The following hypothetical as to Count 3 may help to illustrate the problem we perceive. That Count alleged three separate transactions of Beros's criminal conduct: (1) the use of a Joint Council credit card to pay air fare for himself and his wife; (2) occupying a hotel suite that cost $160.00 per day rather than a single or double room which would cost no more than $60.00 per day; and (3) remaining in Florida for a couple of

additional days for personal reasons after the conclusion of the conference. We can easily imagine that only four jurors thought that the first act (the improper use of the Joint Council credit card) constituted criminal behavior, that four other jurors believed that act two (occupying a suite rather than a single room), constituted the criminal act, and that the final four jurors believed that the third act (Beros's remaining in Florida for personal reasons for a couple days after the conference) provided the basis for conviction. In this scenario, the jury would unanimously conclude that there was a mode or manner of violating the law, but there would be no unanimity as to the predicate act. Also, under such a scenario, any verdict would be defective because of the lack of real unanimity.

When the government chooses to prosecute under an indictment advancing multiple theories, it must prove beyond a reasonable doubt at least one of the theories to the satisfaction of the entire jury. It cannot rely on a composite theory of guilt, producing twelve jurors who unanimously thought the defendant was guilty but who were not unanimous in their assessment of which act supported the verdict.

> Conviction by a jury that was not unanimous as to the defendant's specific illegal action is no more justifiable than is a conviction by a jury that is not unanimous on the specific count. In this case, the permutations that can support a valid conviction are varied and several. What may not vary, however, is the required unanimity of each aspect of the jury's finding. We are convinced that the sixth amendment requires such unanimity, and we must be certain that the jury was properly instructed to achieve it. United States v. Peterson, 768 F.2d 64, 67 (2d Cir.), cert. denied, 474 U.S. 923, 106 S.Ct. 257, 88 L.Ed.2d 264 (1985). We conclude that the circumstances of this case, similar to those of Gipson, warranted more specific instructions regarding jury unanimity.

In United States v. Holley, 942 F.2d 916 (CA5 1991), a two count perjury prosecution, the court of appeals held the failure to give specific unanimity instruction was reversible error, denying the defendant the right to a unanimous jury verdict of guilt as to at least one

charged statement in each count of the indictment. There, where a single count as submitted to the jury embraced two or more separate offenses, though each be a violation of the same statute, the appeals court reversed and remanded, saying, id. at _____:

> The most reasonable interpretation of the court's instruction quoted above is that each juror was individually required to find at least one statement in each count to have been knowingly false in order to find Holley guilty. The instruction does not, however, require that all of the jurors concur in the knowing falsity of at least one particular statement. Holley specifically objected to the charge because it contained no such requirement. We conclude that there was a reasonable possibility that the jury was not unanimous with respect to at least one statement in each count. The district court therefore erred in overruling Holley's objection and a new trial is required.

In United States v. Mangieri, 694 F.2d 1270, 1279-1282 (CA D.C. 1982), the

court affirmed after reviewing the issue, but being unable to conclude in viewing the jury instructions in the context of the whole trial that it was plain error not to give the more particularized jury instruction on the need for unanimity on the particular acts on which a guilty verdict is based.

In United States v. Busacca, 863 F.2d 433, 435-439 (CA6 1988), the court affirmed the conviction for embezzling money from the union finding no ambiguity as to the nature of the act -- the obtaining of the union contribution for Robinson's death benefits insurance -- given the trial court's specific unanimous instructions as to the theory the jury used to find the defendant guilty.

This issue needs further clarification from the Supreme Court. The issues as to acts which Petitioner raises

are distinguishable from that of culpable mental states resolved in Schad v. Arizona, 501 U.S. ___, 111 S.Ct. 2491, ___ L.Ed.2d ___ (1991), which held unanimity was not required on which of two bases for first degree murder, i.e. premeditated or during course of a felony. The Schad analysis rested on historical precedent as to what process was due in the context of a conviction on alternative theories of felony murder and premeditated murder. Schad is very limited to its facts where alternative means of murder satisfy the mental element of the single offense.

In Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860, 1866, 1869, 1870, 100 L.Ed.2d 384 (1988), the Court reversed a death sentence for and remanded the cause, saying in part:

> The critical question, then, is whether petitioner's interpretation of the sentencing process is one a reasonable jury

could have drawn from the instructions given by the trial judge and from the verdict form employed in this case. See Francis v. Franklin, 471 U.S. 307, 315-316, 105 S.Ct. 1965, 1972, 85 L.Ed.2d 344 (1985) ("The question ... is not what the State Supreme Court declares the meaning of the charge to be, but rather what a reasonable juror could have understood the charge as meaning"), citing Sandstrom v. Montana, 442 U.S. 510, 516-517, 99 S.Ct. 2450, 2455-2456, 61 L.Ed.2d 39 (1979).

* * * * *

With respect to findings of guilt on criminal charges, the Court consistently has followed the rule that the jury's verdict must be set aside if it could be supported on one ground but not on another, and the reviewing court was uncertain which of the two grounds was relied upon by the jury in reaching the verdict. See, e.g., Yates v. United States, 354 U.S. 298, 312, 77 S.Ct. 1064, 1073, 1 L.Ed.2d 1356 (1957); Stromberg v. California, 283 U.S. 359, 367-368, 51 S.Ct. 532, 535, 75 L.Ed. 1117 (1931).

* * * * *

There is, of course, no extrinsic evidence of what the jury in this case actually

> thought. We have before us only the verdict form and the judge's instructions.
>
> * * * * *
>
> No one on this Court was a member of the jury that sentenced Ralph Mills, or of any similarly instructed jury in Maryland. We cannot say with any degree of confidence which interpretation Mills' jury adopted. But common sense and what little extrinsic evidence we possess suggest that juries do not leave blanks and do not report themselves as deadlocked over mitigating circumstances after reasonable deliberation, see Tr. of Oral Arg. 42, unless they are expressly instructed to do so.

In Yates v. United States, 354 U.S. 298, 312, 77 S.Ct. 1064, 1073, 1 L.Ed.2d 1356 (1957), a prosecution for conspiring to advocate and teach the overthrow of the government by force and violence and to organize, as the Communist Party of the United States, a society of persons who so advocate and teach, with intent of causing overthrow of government by force and

violence, the Court concluded that, because the general verdict made it impossible to determine which basis of the jury selected for its verdict, the judgment had to be set aside where the verdict was supportable on one ground, but not on the other since one arm of the conspiracy was barred by the statute of limitations. There the Court said, id. at 354 U.S. 311-312, 77 S.Ct. 1073 (footnotes omitted):

> The Government contends that even if the trial court was mistaken in its construction of the statute, the error was harmless because the conspiracy charged embraced both "advocacy" of violent overthrow and "organizing" the Communist Party, and the jury was instructed that in order to convict it must find a conspiracy extending to both objectives. Hence, the argument is, the jury must in any event be taken to have found petitioners guilty of conspiring to advocate, and the convictions are supportable on that basis alone. We cannot accept this proposition for a number of

reasons. The portions of the trial court's instructions relied on by the Government are not sufficiently clear or specific to warrant our drawing the inference that the jury understood it must find an agreement extending to both "advocacy" and "organizing" in order to convict. Further, in order to convict, the jury was required, as the court charged, to find an overt act which was "knowingly done in furtherance of an object or purpose of the conspiracy charged in the indictment," and we have no way of knowing whether the overt act found by the jury was one which it believed to be in furtherance of the "advocacy" rather than the "organizing" objective of the alleged conspiracy. The character of most of the overt acts alleged associates them as readily with "organizing" as with "advocacy." In these circumstances we think the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected. Stromberg v. People of State of California, 283 U.S. 359, 367-368, 51 S.Ct. 532, 535, 75 L.Ed. 1117; Williams v. State of North Carolina, 317 U.S. 287, 291-292, 63 S.Ct. 207, 209-210, 87 L.Ed. 279; Cramer v. United

States, 325 U.S. 1, 36, 65 S.Ct. 918, 935, note 45, 89 L.Ed. 1441.

> We conclude, therefore, that since the Communist Party came into being in 1945, and the indictment was not returned until 1951, the three-year statute of limitations had run on the "organizing" charge, and required the withdrawal of that part of the indictment from the jury's consideration. Samuel v. United States, 9 Cir., 169 F.2d 787, 798. See also Haupt v. United States, 330 U.S. 631, 641, note 1, 67 S.Ct. 874, 878, 91 L.Ed. 1145; Stromberg v. People of State of California, supra, 283 U.S. at page 368, 51 S.Ct. at page 535.

In Cramer v. United States, 325 U.S. 1, 36 n. 45, 65 S.Ct. 918, 935 n. 45, 89 L.Ed. 144 (1945), the Court reversed, holding that overt acts 1 and 2 were insufficient as proved to support the judgment of conviction of treason after noting at 45 in part:

> The verdict in this case was a general one of guilty, without special findings as to the acts on which it rests. Since it is not possible to

> identify the grounds on which Cramer was convicted, the verdict must be set aside if any of the separable acts submitted was insufficient. Stromberg v. California, 283 U.S. 359, 368, 51 S.Ct. 532, 535, 75 L.Ed. 1117, 73 A.L.R. 1484; Williams v. North Carolina, 317 U.S. 287, 292, 63 S.Ct. 207, 210, 87 L.Ed. 279, 143 A.L.R. 1273.

In Stromberg v. California, 283 U.S. 359, 367-370, 51 S.Ct. 532, 535-536, 75 L.Ed. 1117 (1931), the Court reversed the conviction and remanded the case for further proceedings where one charged objective or statutorily proscribed purpose of the flag raising was unconstitutional under the First Amendment and the general verdict made it impossible to identify on which statutory ground the judgment rested where in the instructions to the jury the trial court followed the express terms of the statute and treated the described purposes disjunctively, holding that the defendant should be

convicted if the flag was displayed for any one of the three purposes named. There the offense in the information, as to the purposes for which the red U.S. Communist Party's flag was raised, was laid conjunctively, uniting the three purposes which the statute condemned. There, the Court analyzed, saying, id. at 283 U.S. 367-368, 51 S.Ct. 535:

> We are unable to agree with this disposition of the case. The verdict against the appellant was a general one. It did not specify the ground upon which it rested. As there were three purposes set forth in the statute, and the jury was instructed that their verdict might be given with respect to any one of them, independently considered, it is impossible to say under which clause of the statute the conviction was obtained. If any one of these clauses, which the state court has held to be separable, was invalid, it cannot be determined upon this record that the appellant was not convicted under that clause. It may be added that this is far from being a merely academic proposition, as it appears, upon

> an examination of the original record filed with this Court, that the State's attorney upon the trial emphatically urged upon the jury that they could convict the appellant under the first clause alone, without regard to the other clauses. It follows that instead of its being permissible to hold, with the state court, that the verdict could be sustained if any one of the clauses of the statute were found to be valid, the necessary conclusion from the manner in which the case was sent to the jury is that, if any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld.

CONCLUSION

For the foregoing compelling reasons, this Court should grant this petition for writ of certiorari.

DATED: October 23, 1991.

Respectfully submitted by
Petitioner's Attorney,

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BRF225

91-700

Supreme Court, U.S.
FILED
OCT 24 1991
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

TEODORA OLIVAREZ,
PETITIONER

VS.

UNITED STATES OF AMERICA,
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-2826
(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TEODORA OLIVAREZ,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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(July 25, 1991)

Before POLITZ, DAVIS and BARKSDALE, Circuit Judges.* POLITZ, Circuit Judge:

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Convicted under 31 U.S.C. § 5324 for structuring a monetary transaction to evade federal reporting requirements, Teodora Olivarez appeals, claiming error in the jury charge and errors in her sentence. Finding no error of law in either the trial or sentencing, we affirm.

BACKGROUND

Accompanied by her mother Olivarez entered a bank and offered to pay a bank officer a commission on a monetary exchange if the bank would not file a Currency Transaction Report (CTR). The officer refused. Olivarez then went to a bank teller and exchanged $9,000 in five-dollar bills for an equivalent sum in hundred-dollar bills. Olivarez told the teller that her mother had nine thousand additional dollars to exchange. Olivarez's mother left the bank and returned with the

cash. The teller explained to Olivarez that because the exchange was for more than $10,000 a CTR must be completed. Olivarez claimed not to have identification and insisted that the bank officer had condoned the transaction without a CTR. Olivarez placed the $18,000 in her purse. The bank filed a CTR for the transaction.

Olivarez was indicted under 31 U.S.C. § 5324(1), (3), and 18 U.S.C. § 2 for structuring a transaction to evade the reporting requirements of 31 U.S.C. § 5313(a). Pursuant to section 5324(1), it is a federal offense to "cause or attempt to cause" a bank to fail to file a CTR. The indictment tracked the language of the statute but replaced "or" with "and." Over the objections of defense counsel the jury instructions mirrored the language of the statute. The indictment was also read to the jury. The jury returned a guilty

verdict and Olivarez was sentenced to twelve months and one day imprisonment plus two years of supervised release. She timely appealed.

ANALYSIS

Olivarez contends that her conviction is constitutionally infirm because there is insufficient evidence to support one of the possible offenses recited to the jury. The jury instruction included in its list of criminal offenses the act of causing a financial institution to fail to file a CTR. The bank did, however, file a CTR. Olivarez concedes that the trial evidence was sufficient to support other offenses in the indictment.

On two separate occasions, Olivarez objected to the use of "or" in the jury instruction. Because the ground articulated at trial differs from the

ground Olivarez presents on appeal,[1] a plan error standard of review applies. Fed.R. Crim.P. 51, 52(b). However, closer scrutiny may be appropriate where, as here, "the failure to preserve the precise grounds for error is mitigated by an objection on related grounds." United State v. Lopez, 923 F.2d 47, 50 (5th Cir.), cert. denied, 111 S.Ct. 2032 (1991) (citing United States v. Brown, 555 F.2d 407, 420

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[1] In making the objection, counsel explained that because the indictment was phrased in the conjunctive, the government should be required to prove each element listed. This ground for objection has no merit. A disjunctive statute may be pled conjunctively and proved disjunctively. Turner v. United States, 396 U.S. 398 (1970); United States v. Pigrum, 922 F.2d 249 (5th Cir.), cert. denied, 111 S.Ct. 2064 (1991) (citing Crain v. United States, 162 U.S. 625 (1896)); Capps v. Collins, 900 F.2d (5th Cir. 1990), cert. denied, 111 S.Ct. 758 (1991); United States v. Merida, 765 F.2d 1205 (5th Cir. 1985); United States v. Webb, 747 F.2d 278 (5th Cir. 1984), cert. denied, 469 U.S. 1226 (1985).

(5th Cir. 1977), cert. denied, 435 U.S. 904 (1978)).[2]

Disjunctive statutes ordinarily may be read to the jury. United States v. Harrelson, 705 F.2d 733, 736 & n. 4 (5th Cir. 1983), cert. denied, 474 U.S. 1034 (1985); Cunningham v. United States, 356 F.2d 454 (5th Cir.) cert. denied, 384 U.S. 952 (1966). The jury instruction may be in error, however, if one of the recited grounds for conviction is prohibited and if

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[2] We decline to apply the "manifest miscarriage of justice" standard of United States v. Ruiz, 860 F.2d 615, 617 (5th Cir. 1988). See also United States v. Lopez-Escobar, 920 F.2d 1241, 1245 (5th Cir. 1991); United States v. Shaw, 920 F.2d 1225, 1230 (5th Cir.), cert. denied, 111 S.Ct. 2038 (1991). This standard applies to a motion for acquittal based on sufficiency of the evidence if that motion was made at the close of the government's case-in-chief but not renewed at the close of all the evidence. The ground presented in this appeal is distinct from a sufficiency-of-the-evidence motion for acquittal.

it is impossible to tell whether the jury selected that particular ground as the basis for conviction. Yates v. United States, 354 U.S. 298 (1957). In this case, it is almost certain that the jury did not find that Olivarez caused a failure to file a CTR. Government counsel claimed and witnesses testified to the jury without challenge that a CTR was filed. There was no evidence to the contrary.

A disjunctive instruction may also be in error if "'a genuine possibility of juror confusion'" suggests that the verdict was not unanimous. United States v. MMR Corp., (LA), 907 F.2d 489, 496 (5th Cir. 1990), cert. denied, 111 S.Ct. 1388 (1991) (quoting United States v. Phillips, 869 F.2d 1361, 1366 (10th Cir. 1988), cert. denied, 109 S.Ct. 2074 (1989), and citing United States v. Gipson, 553 F.2d 453 (1977)). Juror confusion will not be

presumed. Id.; see also United States v. Bolts, 558 F.2d 316, 326 n.4 (5th Cir.), cert. denied, 434 U.S. 930 (1977) (explaining the limited application of Gipson). A fair reading of the trial record does not reveal any cause for confusion. There is no suggestion that the verdict was not unanimous. At the request of defense counsel the court polled the 12 jurors, each of whom affirmatively replied that the verdict of guilty was his/her verdict.

Olivarez then contends that the trial judge erred in computing and imposing sentence. First, the court declined to accept a two-point offense level reduction for acceptance of responsibility. In sentence computations we accord great deference to the trial judge. United States v. Roberson, 872 F.2d 597 (5th Cir.), cert. denied, 110 S.Ct. 175 (1989).

To obtain this reduction under sentencing guideline 3E1.1 Olivarez had the burden of establishing that she had accepted responsibility for "all relevant criminal conduct." United States v. Mourning, 914 F.2d 699, 706 (5th Cir. 1990). A declaration of remorse is not enough; nor is a claim of sorrow for a claimed ignorance of the law. The trial judge refused to find that her acceptance of responsibility was sincere.

Olivarez then maintains that the court erred for not making a downward departure from the guideline sentence based on her claim that she sought no financial gain by the transaction. The judge considered but rejected this claim, concluding that an attempted tax evasion was the apparent gain. We will not disturb a sentencing court's refusal to depart from the guidelines unless we find such to be in

violation of the sentencing statute or guidelines. United States v. Hatchett, 923 F.2d 369 (5th Cir. 1991). We find no such violation here.

The other challenges to the sentence and sentencing procedure are without merit and require no discussion.

The conviction and sentence are AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-2826

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TEODORA OLIVAREZ,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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ON SUGGESTION FOR REHEARING EN BANC

(Opinion July 25, 5 Cir., 1991, ___F.2d___)
(August 21, 1991)

Before POLITZ, DAVIS and BARKSDALE, Circuit Judges.

PER CURIAM:

Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Henry A. Politz
United States Circuit Judge

REHG-8

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

Criminal No. M-90-152-01

UNITED STATES OF AMERICA,
Plaintiff

versus

TEODORA OLIVAREZ,
Defendant

FINAL JURY INSTRUCTIONS (Partial)

Also in any criminal case the Government must prove not only the essential elements of the offense charged, as I will give them to you shortly, but they must of course prove the identity of the defendant as the one who committed the alleged offense.

If after examining all the evidence in the case you have a reasonable doubt as to the identity of the defendant as the one

who committed the offense charged, you must find her not guilty.

Ladies and gentlemen, as I told you this morning, you are going to have a copy of the Indictment in that jury room for your deliberations.

It reads as follows: It alleges that on or about April 13th, 1988, in the Southern District of Texas and within the jurisdiction of the court, the defendant Teodora Olivarez, did knowingly and willfully for the purpose of evading the reporting requirements of Title 31, U.S. Code Section 5313 (a) cause and attempt to cause a domestic financial institution, to wit, the First National Bank of Rio Grande City, Texas, to fail to file a report required under Section 5313 (a), and did cause and attempt to cause, structure, attempt to structure, and assist in structuring, a transaction with First

National Bank of Rio Grande City, Texas, by exchanging $18,000 in $5 United States currency bills for $100 bills, by structuring the transaction by dividing the exchange into two exchanges of $9,000 each.

And ladies and gentlemen, they allege that this is a violation of Title 31, U.S. Code Sections 5324 (1) and (3) and Title 18, U.S. Code Section 2.

And ladies and gentlemen, Title 31, U.S. Code Section 5313 (a) as referred to in the body of the allegation of the Indictment, reads as follows, the important part with regards to the allegations in this case: Title 31, U.S. Code Section 5313 (a). It says when a domestic financial institution is involved in a transaction for the payment, receipt or transfer of United States coins or currency or other monetary instruments the Secretary of the Treasury prescribes in an amount,

denomination or amount and denomination under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes.

The regulations setting forth the requirements are in Title 31, Code of Federal Regulations, Section 103.22 (a)(1), and the important part with regards to the allegations in this Indictment reads as follows: It says, each financial institution, other than a casino or the Postal Service, shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer by, through, or to such financial institution which involves a transaction in currency of more than $10,000. Multiple currency

transactions shall be treated as a single transaction if the financial institution has knowledge that they are by or on behalf of any person and result in either cash in or cash out totalling more than $10,000 during any one business day.

And ladies and gentlemen, the regulations define a transaction in currency as a transaction involving the physical transfer of currency from one person to another. Currency does include cash, and it includes, quote, the coin and paper money of the United States or of any other country that is designated as legal tender and that circulates and is customarily used and accepted as a medium of exchange in the country of the issuance, and also includes U.S. silver certificates, U.S. notes and Federal Reserve notes.

Ladies and gentlemen, Title 31, U.S. Code Section 5324, states the following:

It says -- this is the statute the Government is saying the defendant violated -- Sections (1) and (3) read as follows: It says, no person shall for the purpose of evading the reporting requirements of Section 5313 (a) with respect to such transaction, (1) cause or attempt to cause a domestic financial institution to fail to file a report required under Section 5313 (a), or (3) structure or assist in structuring or attempt to structure or assist in structuring any transaction with one or more domestic financial institutions.

Let me read that statute again, the parts that apply in this case. This is Title 31, U.S. Code Section 5324. It says no person shall for the purpose of evading the reporting requirements of Section 5313 (a) -- Section 5313 (a) is the one that I read to you a little while ago -- and then

this statute reads, continues with respect to such transaction (1) cause or attempt to cause a domestic financial institution to fail to file a report required under Section 5313 (a) or (3) assist or assist in structuring or attempt to structure or assist in structuring any transaction with one or more domestic financial institutions.

The term "structuring" has been defined in Title 31, Code of Federal Regulations, Section 013.11(n) as follows: A person structures a transaction if that person acting alone or in conjunction with or on behalf of other persons conducts or attempts to conduct one or more transactions in currency in any amount at one or more financial institutions on one or more days in any manner for the purpose of evading the reporting requirements under Section 103.22 of this part.

"In any manner" includes but is not limited to the breaking down of a single sum of currency exceeding $10,000 into smaller sums, including sums at or below $10,000 or the conduct of a transaction or series of currency transactions, including transactions at or below $10,000. The transaction or transactions need not exceed the $10,000 reporting threshold at any single financial institution or any single day in order to constitute structuring within the meaning of this definition.

Ladies and gentlemen, in order to find that the defendant is guilty of the offense alleged in this Indictment, the Government must prove each of the following three elements beyond a reasonable doubt.

First, that the defendant knew that the institution named in the Indictment, this First National Bank of Rio Grande City, was a financial institution with a

legal requirement to report a currency transaction as required under Title 31, Code of Federal Regulations, Section 103.22 (a)(1).

So that's the first thing that has to be proven to you beyond a reasonable doubt in order to convict the defendant of this allegation, first, that the defendant knew that the institution named in the Indictment was a financial institution with a legal requirement to report a currency transaction as required under Title 31, Code of Federal Regulations, Section 103.22 (a)(1).

Second, that the defendant knowingly and willfully caused or attempted to cause a domestic financial institution to fail to file a report required under Section 5313 (a) or knowingly and willfully caused or attempt to cause structure or attempt to structure and assist in structuring a

currency transaction as alleged in the Indictment.

And third, that the defendant in causing or attempting to cause a domestic financial institution to fail to file a report required under Section 5313 (a) or in causing or attempting to cause a structure or attempting to structure or assisting in structuring a transaction as alleged in the Indictment did so knowingly and willfully with the specific intent for the purpose of evading the currency transaction reporting requirements of Title 31, Code of Federal Regulations, Section 103.22 (a)(1).

So those are the three things that need to be proved in order for you to be, find the defendant guilty of this offense, and they have to be proven to you beyond a reasonable doubt.

Ladies and gentlemen, also in the Indictment the allegation is that the defendant violated Title 18, Section 2, Title 18, U.S. Code Section 2. This is what is known in the United States as aiding and abetting statute, and in this country the guilt of a defendant in any criminal case may be established without proof that she personally did every act constituted in the alleged offense.

The law recognizes in this country that ordinarily anything a person can do for herself may also be accomplished by her through the direction of another person as his agent -- as her agent -- or acting in concert with or under the direction of another person or persons in a joint effort or enterprise.

Title 18, U.S. Code Section 2, reads as follows: Whoever commits an offense against the United States, or aids, abets,

counsels, commands and uses or procures its commission is punishable as a principal. Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

So in other words under the aiding and abetting statute, if the acts or conduct of any agent, employee, or other associate of the defendant are willfully directed and authorized by her, or if the defendant aids and abets another person by willfully joining together with such person in the commission of a crime, then the law holds the defendant responsible for the acts and conduct of such other persons just as though she had committed the acts or engaged in such conduct himself, herself.

Notice, however, that before any defendant may be held criminally

responsible for the acts of others, it is necessary that the defendant willfully associate herself in some way with a criminal venture, and willfully participate in it as she would in something she wishes to bring about, that is to say that she willfully seeks by some act or omission of hers to make the criminal venture succeed.

Of course mere presence at the scene of a crime and knowledge that a crime is being committed are not sufficient to establish that a defendant either directed or aided and abetted the crime unless you find beyond a reasonable doubt that the defendant was a participant and not merely a spectator. In other words you may not find the defendant guilty under the aiding and abetting statute unless you find beyond a reasonable doubt that every element of the offense as defined in these instructions was committed by some person

or persons, and that the defendant willfully participated in its commission.

When you go into that jury room you are going to note that the Indictment or the charges that the offense was committed on or about a certain date. The proof need not establish with certainty the exact date of the alleged offense. It is sufficient if the evidence in the case establishes beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged.

The word "knowingly" as that term has been used from time to time in these instructions means that the act was done voluntarily and intentionally, and not because of mistake or accident.

The word "willfully" as that term has been used from time to time in these instructions means that the act was committed voluntarily and purposely, with

the specific intent to do something the law forbids, that is to say with bad purpose, either to disobey or disregard the law.

The crime charged in this case is a serious crime, which requires proof of specific intent before the defendant can be convicted.

"Specific intent" as the term implies, means more than the general intent to commit the act. To establish specific intent, the Government must prove the defendant knowingly did an act which the law forbids, purposely intending to violate the law, and such intent may be determined from all the facts and circumstances surrounding the case.

I also caution you here, ladies and gentlemen, that you are here to determine whether the defendant is guilty or not guilty from the evidence in this case.

She is not on trial for any act or conduct or offense not alleged in the Indictment, neither are you being called upon to return a verdict as to someone else who is not on trial in this case.

Also the punishment provided by the law for this particular offense in Federal Court is a matter exclusively for the decision of the judge, and should in no way be considered by you in deciding as to whether to return a verdict of Guilty or Not Guilty with regards to this charge.

Any verdict that you return has to be unanimous, whether it's Guilty or Not Guilty. Every single one of you has to agree to it. You have not reached a verdict as to Guilty or Not Guilty until every single one of you has agreed to it.

When you are in there deliberating, it is your duty to consult with one another in order to reach agreement, if you can do so

without violence to your own individual judgment. Each of you obviously has to decide the case for yourself, but only after a fair and impartial consideration of the evidence in the case with your fellow jurors.

While you are deliberating, do not hesitate to re-examine your own views or change your opinion, if you are convinced that it was wrong. But do not surrender your honest conviction as to the weight or the effect of the evidence, solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

In that regard, you can take as long as you want to reach your verdicts in this case, or as short as you want. No one will be out here when you come out here saying they took too long a time or they took too

short a time. That's strictly your decision.

The only thing that is required is that you consider all the evidence and that you follow the law as I have given it to you.

And also you're not here for one side or the other. You're judges of the facts in this case. Your sole interest is to seek the truth from the evidence in the case. When you do retire into the jury room to start your deliberations, the first thing I want you to do is to select a foreperson. That person presides over your deliberations and is your spokesperson in the courtroom. Once you have done that and you have received a copy of the Indictment and the jury verdict form, it says we, the jury, find Teodora Olivarez, the defendant here, insert "Guilty" or "Not Guilty" on Count One as charged in the Indictment.

Foreperson signs it and dates it, and please use a pen.

When you have reached your verdicts, and the foreperson lets the marshal know that you have reached a verdict, please fold the verdict form, and you will be brought into the courtroom. I will ask for the verdict form here in the courtroom and then it's brought up to me by the marshal and I read it out loud here in the courtroom.

If at any point you need to send me a note, there is a jury note form, fold it up after you have written the note on there, and give it to the marshal, and I will either respond to you in writing or here in the courtroom out loud.

But don't ever send me a note that says we are divided and so many of us are voting this way and so many of us are voting this other way. If there is a

numbers division while you are deliberating, we can't know what those numbers are, so don't ever send me a note that gives me the numbers if you're divided.

Also when you're deliberating if one of you takes a break, quit talking about the case and wait for that person to come back. That way everybody else hears what everybody else has to say.

Those are my instructions. I need to briefly visit with the attorneys. I'm going to ask you to wait outside in the hallway for just a second.

Please rise for the jury.

(Jury out, the following proceedings were had in open court:)

THE COURT: Please be seated.

Mr. Leonard, do you have any objections, corrections, or additions to the Court's instructions?

MR. LEONARD: No, sir.

THE COURT: Mr. Villarreal?

MR. VILLARREAL: Your Honor, I would stand on my prior objection to the phrasing in the different charges in the dysjunctive as opposed to the conjunctive.

THE COURT: Okay, the Court will overrule that.

* * * * *

(The following proceedings were had in open court, in the presence of the jury:)

THE COURT: Please be seated.

Ladies and gentlemen, the term "financial institution" does include under the statutes, applicable statutes here, a bank whose deposits are insured by the Federal Deposit Insurance Corporation.

* * * * *

The rest of you all, if you all would go into the jury room, select your foreperson. When you receive the

Indictment and the verdict form, go ahead and start your deliberation, and when you have reached a verdict let the marshal know.

Please rise for the jury.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

Criminal No. M-90-152-01

UNITED STATES OF AMERICA,

Plaintiff

versus

TEODORA OLIVAREZ,

Defendant

PROSECUTOR'S JURY ARGUMENTS (Partial)

THE COURT: Ladies and gentlemen, I've told each one of the attorneys that they've got fifteen minutes to argue the case.

Under the rules the Government's attorney, Mr. Leonard, goes first, and he can save some time for rebuttal. Mr. Villarreal, the defense attorney, goes second, but he has to use all his time up at the same time.

Mr. Leonard, you've got fifteen minutes, sir.

MR. LEONARD: Thank you, sir.

If it please the Court and counsel.

Ladies and gentlemen, I told you this morning this would be a relatively short trial, but it's nonetheless important. It's important, because the United States has charged there is a violation of the law.

Now whether or not we agree with that law is inimportant, because as jurors you have taken an oath to follow the law as the Judge is going to give it to you.

You may not like $10,000 reporting requirements, that is the law, and the Judge will give you that specific law, and explain some of the technicalities to you.

Your job as jurors is judges of the fact. You have to figure out that if on or about April 13, Miss Olivarez tried to evade reporting requirements or help evade the reporting requirements of that bank, that is the reporting requirements that they report any amount over $10,000, by attempting to structure, and actually structuring those transactions that she was involved in. That's your duty.

And how did she do it? By exchanging $18,000 in $5 bills into $100 bills of nine thousand each, she split it up into nine thousand, so as not to trigger that ten thousand.

And who does she have in with her? She says her mother, and I would accept that, and it's really a shame. And let's look at the difference of testimony we have here.

You have three bankers basically. These bankers come to you -- first of all, I'll tell you about Mr. Gilbert Alvarado, over at First City here. She worked under him, and they always give this training about the $10,000.

So this lady, she already knew about that reporting requirement, not just like any Joe Blow off the street, but a person who deals in banking and knows the ten thousand, because they give these constant courses, and she admitted she knew about it.

So who do we have next? Elmo Moreno, and here is where it really gets different. Somebody is not exactly careful with the truth. It's like the old Annie Get Your Gun play, they say they're not exactly lying, they're just not careful with the truth.

Your job is to truth-seek. What is the truth?

She states, well, she went in to Mr. Moreno, and even though Mr. Moreno had never seen her before and had only dealt with her husband, he was talking to her about having her buy his house in a house deal.

Mr. Moreno says, "I didn't even have a house for sale at that time. I've never talked to her about a house deal." Who is telling the truth?

She goes on to discuss with you the fact that whether or not her mother was there when she was talking to Mr. Moreno. And then again she acknowledges, yes, she knew about that $10,000 requirement, but for some odd reason she has to go in and tell this banker about these $5 bills, if she knows about this ten thousand requirement.

What is she so nervous about if she wasn't intending to violate the law?

And then it's a clincher, she tries to bribe Mr. Moreno. Mr. Moreno had been a banker a long time up there in Rio Grande.

Mr. Moreno, I asked him, "Why do you remember this? How many times have you had people offer you money to get you to violate that section of the law, to get you to structure those transactions or allow you to structure and not fill out those reporting requirements? How many times before or since this defendant came in and asked that?" Never.

* * * * *

No, she was there to take $18,000 in $5 bills, which she claims to have gotten from a deceased brother, $18,000 in $5 bills, to exchange them into easier

carrying currency, I submit to you, which is $100 bills.

And knowing full well that currency transaction reporting requirement, she first of all tried to get around it by bribing Mr. Moreno, and then when that didn't work she tried to get around it by going to Miss Sepulveda and saying Mr. Moreno had okayed it, and no, I'm not going to give you the information, trying to get out without being noticed who she really was.

And it may take a little time, but she was finally caught, and brought here before you.

I'll reserve my time, your Honor.

THE COURT: You've used about nine minutes.

Gentlemen, I need to visit with you all, and rather than just doing it up

here I'm going to go ahead and send the jury out for a few minutes.

Please rise for the jury.

(The following proceedings were had in open court, outside the presence of the jury:)

THE COURT: You all go ahead and have a seat.

Mr. Leonard, exactly what are you proceeding on here? You've charged her with two different things in this Count One of the Indictment.

MR. LEONARD: On the --

THE COURT: You've charged her with causing and attempt to cause a domestic financial institution to fail to file a report, and structuring. So which one are you proceedings on, both of them or one of them or what?

MR. LEONARD: Both of them, your Honor.

THE COURT: Well, aren't those two separate charges?

MR. LEONARD: Your Honor, I believe --

THE COURT: They're two different parts of the statute.

MR. LEONARD: Then I would proceed just on the structuring, your Honor.

THE COURT: You've charged her with 5324 (1) and (3) here.

MR. LEONARD: Yes, sir.

THE COURT: Wouldn't that be two separate charges?

MR. LEONARD: Your Honor, I would have it as a violation of 5324 --

THE COURT: Wouldn't there be a punishment for each one of them under the penalty provisions? Where is that?

MR. LEONARD: I believe the penalty provisions is No. 5322, your Honor.

THE COURT: It's not in this book. Can I get you to get that for me? Here it is.

MR. LEONARD: It's 5322 (a), your Honor.

THE COURT: Aren't those two separate violations?

MR. LEONARD: Your Honor, the way I read it is that violation --

THE COURT: It says "or"

MR. LEONARD: -- is 5313 with respect to each transaction --

THE COURT: 5324 says no person for the purpose of evading a reporting requirement of Section 5313 (a) with respect to such transaction cause or attempt to cause a domestic financial institution to fail to file a report required under Section 5313 (a) to cause or attempt to cause a domestic financial institution to file a report required under

Section 5313 (a) that contains a material omission or misstatement of fact or structure or assist in structuring or attempt to structure or assist in structuring any transaction with one or more domestic financial institutions.

So what are you proceeding under here? I mean what's the violation that you are alleging here?

MR. LEONARD: Your Honor, I was alleging a violation of (1) and (3). If the Court is saying --

THE COURT: I don't know what I'm saying. This is your responsibility. You're the one that charged her. It's not my responsibility to find out what the law is. You charged her with this.

Is this two separate violations, or one, or what?

MR. LEONARD: It is one violation, your Honor, in which she violated both of these subsections of this one violation.

THE COURT: And you don't need to allege that in separate counts of the Indictment, or what?

MR. LEONARD: No, your Honor, I don't believe so.

THE COURT: And why not?

MR. LEONARD: Because it's a violation of the one of --

THE COURT: It says "or", it doesn't say "and".

MR. LEONARD: And I'd put in my Indictment, trying to --

THE COURT: You put "and".

MR. LEONARD: "And", that is a conjunctive, I have to prove both.

THE COURT: So you're saying you have to prove both of these things in order to convict her?

MR. LEONARD: I believe if I put it in there, your Honor, I've done more than --

THE COURT: That's not what the law is. The law is when you put "and" in, and it's "or" in the statute, you have always argued, and that's what the law is, that "or" is enough, that it doesn't have to be "and".

But if you want to have me instruct them in that fashion, that's fine.

But this is another example of how you all word these indictments in such a fashion that you all don't really pay much attention to them.

You all had plenty of time. You all can decide when they take them to the Grand Jury. It's like when they hit you with them all at once. That's why you all should pay more attention to these.

What were you arguing to the jury here?

MR. LEONARD: On my final version here I was arguing structuring, your Honor.

THE COURT: From hearing your argument, it wasn't clear to me what you all were proceeding on. It's still not clear to me what you all are proceeding on.

We'll take a shore break here.

(Recess taken at 2:55 p.m.)

(The following proceedings were had in open court, outside the presence of the jury:)

THE COURT: She was charged earlier with a violation of 5324, and then you put (1) and (3) here.

MR. LEONARD: Yes, sir.

THE COURT: The statute reads (1) or (3), and the case law appears to be when that is the case, although you may have said "and", that the Court can instruct them as "or", but if you want me to instruct them as "and", that's fine with me, I don't have any problem with that.

MR. LEONARD: Your Honor, the case law follows --

THE COURT: Did you find anything, or did you sit here the whole time we were out looking at this?

MR. LEONARD: No, your Honor, I've been looking in the material I have here, and I did not find anything.

THE COURT: You're not going to find anything in the materials that you have here.

MR. LEONARD: And I went to my Title 31 file and I didn't find anything in my Title 31 file, your Honor.

THE COURT: The way the Court's going to instruct them is first that elements that would be required would be first that the defendant knew that the institution named in the Indictment was a financial institution with the legal requirement to report a currency transaction as required

under Title 31 Code of Federal Regulations, Section 103.22 (a)(1), second, that the defendant knowingly and willfully caused and attempted to cause a domestic financial institution as alleged in the Indictment to fail to file a report required under Section 5313 (a), or structured or assisted in structuring a currency transaction as alleged in the Indictment, and third, that the defendant in causing and attempting to cause a domestic financial institution to fail to file a report required under the law, or in structuring or assisting in structuring in the currency transactions as alleged in the Indictment, did so knowingly and willfully with the specific intent for the purpose of evading the currency transaction requirements of Title 31 Code of Federal Regulations, Section 103.22 (a)(1).

I don't know how else to pursue this, other than in this fashion.

MR. LEONARD: Your Honor, that sound acceptable to the Government.

THE COURT: Mr. Villarreal?

MR. VILLARREAL: Obviously, your Honor, I'm going to object to that.

I feel that the Government is obligated to prove that they pled. Since they pled it in the conjunctive, your Honor, I would suggest that that is their obligation, and I would request from the Court to --

THE COURT: Well, you couldn't have been surprised by that. You never raised it before.

5324 (1) and (3) are specifically alleged here, Title 31, Section 5324 (1) and (3), it's very clear the requirement of the structuring is also that it be for the

evading purposes, the same as for number one also.

This shouldn't come as a surprise to anybody here.

MR. VILLARREAL: Fine, Judge, I would just like to make my objection for the record.

THE COURT: And your objection is what?

MR. VILLARREAL: The Government should be required to prove what they have pled, that both violations occurred, your Honor. They allege them in that manner, and I think that they should be required to prove them in that manner.

The fact they have set a higher burden for themselves than possibly the law requires is the Government's doing, it has nothing to do with us, Judge.

THE COURT: The law doesn't require that, even though they've said "and"

If you want me to, I'll be glad to say "and".

MR. LEONARD: You Honor, the Court said the Court found a case --

THE COURT: Not in this kind of transaction. In other cases, like where we have attempts on a Federal official, like a Customs agent or somebody like that, when it's a question of impeding or attempting to impede or whatever, a lot of time you put "and" in there for assault and all those other things that you usually alleged in those kind of cases --

MR. LEONARD: On the allegation, yes, your Honor.

THE COURT: -- the cases in those are clear that it's "or". I suspect that it would be the same thing here.

I'll leave it up to you as the way you want to proceed with this.

MR. LEONARD: I would request that it be given in the dysjunctive "or".

THE COURT: I think that's right, I don't have any problem with that.

Go ahead and bring the jury in so we can continue, and you can start your fifteen minutes.

MR. VILLARREAL: The Court then has overruled my objection, sir?

THE COURT: Yes, sir.

MR. VILLARREAL: Thank you, sir.

(At 3:15 p.m. the following proceedings were had in open court, in the presence of the jury:)

THE COURT: Please be seated.

Mr. Villarreal, you've got fifteen minutes to argue your side of the case.

* * * * *

THE COURT: Thank you, Mr. Villarreal.

Mr. Leonard, you've got six minutes and thirty-five seconds left.

MR. LEONARD: Thank you, sir.

Ladies and gentlemen, you have heard a skillful argument for the defense. As Mr. Villarreal told you when he first spoke, and as the Judge will probably tell you when he gives you the law, arguments by the attorneys are not evidence.

For instance Mr. Villarreal was saying about these agents going to intimidate her or such. Have you ever heard any evidence of such a thing? No. Because it's Mr. Villarreal's conjecture, Mr. Villarreal's speculation, and he wants you to get your focus away from his client and try to say, "Ho, those bad Government agents upholding the law, and trying to investigate." Just as when he said, "Well, what did they do?" "Oh, we're

investigating a bank," or "investigating some bank violations," or what was it?

See, he's trying to get your attention away from that woman over there to get your mind speculating, man, that bank from Starr County, all those people from Starr County must be bad, maybe they're investigating that bank from Starr County.

Ladies and gentlemen, people from Starr County and bankers from Starr County are just like everybody else, and they're not necessarily bad because they're from Starr County. In fact what they do over there is they have very specific procedures so as not to violate the law, not to fail to file a Currency Transaction Report, even though other people are trying to get them not to by bribing them, and when that does not succeed by structuring the transaction.

No, see he's trying to pull your focus away from who is on trial here, and make it on that big bad Government. Like hey, you didn't bring the agents.

Ladies and gentlemen, the agents weren't there when the crime occurred. What could they testify to? They can only testify as to what happened when the crime occurred. Or the tape, the tape, a copy was presented to the lady that actually did it, that actually did it. She looks, she says, "Yes, my memory is refreshed. I know exactly what went on that day. How do I know? Because I can see from my work, that's how I know, besides being able to remember."

And Mr. Alvarado said she was honest. Well, that was at the time she was working for Mr. Alvarado. And I submit to you if she wasn't at that time and if he

found out about about it, if he found out about it, he would fire her.

MR. VILLARREAL: Objection, your Honor.

MR. LEONARD: That --

THE COURT: Mr. Leonard, both of you, let's stick to the evidence that was in this case rather than going off on all these things that have nothing to do with the charges in this case. Let's rely on that.

MR. LEONARD: Thank you, your Honor.

THE COURT: And ladies and gentlemen, I'll tell you that again, these arguments of the attorneys, they're not evidence in the case.

Go ahead.

MR. LEONARD: And ladies and gentlemen, getting back to what Mr. Villarreal said in the very beginning, remember when he said the argument of the

attorneys is not evidence? And that's what he said. And he's brought you on all these rabbit trails, Government agents, of banks, of honesty, all these other rabbit trails that have nothing to do with this crime, the crime is a structuring crime, making the bank fail to file these Currency Transaction Reports, and her failing to file them.

And that's exactly what she did from the evidence that was given to you by those people, the people that were there that day. I was not there, you were not there, Mr. Villarreal was not there. The people that were there that day were those two bank people, the assistant vice-president, who she actually came in to and offered to bribe, and he remembers it because it's the only time it's ever occurred to him in seventeen years of banking.

And the young lady who was the cashier, who asked her repeatedly for an I.D., asked her to help fill out this form that she was going to fill out, and no. And what did she do, she reported it.

So it made an impression on them at that very time that they reported it as a violation, and now she comes up here and says no, it not only didn't happen that way, but I wasn't at that teller, I was at someplace else, and no, I didn't have that conversation with that banker, I had some other conversation.

That's the real crux of this case, not the wild speculations of the defense, about what if, what if, what if.

Remember the evidence does not come from a skillful attorney, it comes from that witness chair, what those witnesses tell you. That's what you believe or disbelieve, and we could tell

you as attorneys it's daylight or dark, it's immaterial whether we say that.

The evidence comes from that witness chair, and the evidence you have allows you to return a verdict of guilty.

THE COURT: Thank you, Mr. Leonard.

Ladies and gentlemen, you have heard the closing arguments of the attorneys, as well as all the evidence in the case.

It becomes my job therefore to instruct you on the rules of law that you have to follow and apply in arriving at your verdicts in the case, your verdict in the case.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

Criminal No. M-90-152-01

UNITED STATES OF AMERICA,

Plaintiff

versus

TEODORA OLIVAREZ,

Defendant

District Court's Instructions On
Jury Notes 1 & 2

(At 6:40 p.m. the following proceedings were had in open court, outside the presence of the jury:)

THE COURT: I have Jury Note No. 1 that simply states, testimony of defendant that she made one transaction with the teller and her mother went to another teller. I suspect they want us to read that portion of the testimony back. I

don't exactly know, I suspect that this was as a result of direct examination.

The only thing I can think of is to ask Miss Faris to go through her notes on that part and see if she gets to a point that we come up with this.

Mr. Leonard, do you have any problem with that?

MR. LEONARD: No, your Honor, if I could see what Miss Faris comes up with, because the question is a little bit vague.

THE COURT: Mr. Villarreal, do you have any problem with that?

MR. VILLARREAL: No objection, sir.

(Recess taken.)

(The following proceedings were had in open court, outside the presence of the jury:)

THE COURT: Gentlemen, my suggestion would be that we start at the point where she's come inside with her mother and stop

at the point, the answer right before the question as to does she have her purse with her.

MR. LEONARD: I would accept that.

MR. VILLARREAL: I would concur with the Court, your Honor.

* * * * *

THE COURT: I'm going to tell them that it's hard to understand their question, but what I think they're asking is this portion of the testimony, that if it's not for them to let us know. Okay?

Go ahead and bring them in.

(Jury in at 6:55 p.m., the following proceedings were had in open court:)

THE COURT: Please be seated.

Mr. Arredondo, you're the foreperson, sir?

JURY FOREMAN: Yes, sir.

THE COURT: Okay. I've received a note from you that says testimony of

defendant that she made one transaction with a teller and her mother went to another teller.

And ladies and gentlemen, it's hard to understand exactly what you want from this. I suspect this means that you want a particular portion of a testimony read back. I have tried to identify something on the record that -- you know, this was a relatively short trial -- and I have tried to identify something on the record that might be what you are asking for. It may not be, and if it's not, you're going to have to send me another note saying that's not what we're looking for.

And Miss Faris, would you please read that portion.

THE REPORTER:

"Q. What did you do after you spoke to your mom in the car?

"A. She got down from the car, and we went inside the building.

"Q. And what did you do?

"A. I went to a teller, and my mother went to another teller.

"Q. Do you remember the name of the teller that you went to?

"A. Yes, sir.

"Q. What was her name?

"A. Thelma Garcia.

"Q. Do you remember the name of the teller that your mother went to?

"A. Yes, sir.

"Q. And what is her name?

"A. Criselda Sepulveda.

"Q. That is the same Miss Sepulveda who testified earlier?

"A. Yes, sir."

THE COURT: Mr. Arredondo and the rest of you, I'm not sure that that's what you are looking for or not. If it's not,

please send me a note and better identify what you are looking for. And that was my answer to that particular note.

If you all would just go back in there and continue deliberating.

Please rise for the jury.

(Jury out to resume deliberating.)

THE COURT: Gentlemen, if you all would continue to make yourselves available in case we have a jury verdict or a note.

(Recess taken.)

(At 7:05 p.m. the following proceedings were had in open court. outside the presence of the jury:)

THE COURT: Gentlemen, you all go ahead and have a seat.

I have Jury Note No. 2. It says during which time was Thelma Garcia notified about the transaction, was it during the second transaction or after it was made and Miss Olivarez had left the

building, and/or was Thelma Garcia present during the transaction, according to Miss Sepulveda's testimony.

* * * * *

(The following proceedings were had in open court, in the presence of the jury:)

THE COURT: Please be seated.

I have Jury Note No. 2 from you, Mr. Arredondo, I guess there's two questions: The first one, during which time was Thelma Garcia notified about the transaction, was it during the second transaction or after it was made and Mrs. Olivarez had left the building, question mark.

Well, ladies and gentlemen, you are the fact finders. I can't be answering questions with regards to answers that like, that require an answer like that. You all heard the testimony, it was relatively short. We didn't have more than

two hours worth of testimony in this case, and this question says during which time was Thelma Garcia notified about the transaction, was it during the second transaction or after it was made and Mrs. Olivarez had left the building.

And then you go: And/or was Thelma Garcia present during the transaction, according to Miss Sepulveda's testimony.

If you are asking for a portion of Miss Sepulveda's testimony or someone else's testimony, you're going to have to identify what you are looking for, but I can not be answering questions with regards to asking me during which time was such-and-such notified, because you're the fact finders, you all have to make a decision as to the facts.

This trial, as far as testimony, we didn't have more than two hours' worth

of testimony in this case, as far as witnesses testifying.

If there is a portion of somebody's testimony, whether Miss Sepulveda or somebody else that you are looking for, you've got to identify that and say we want this portion of this testimony read back, whether it's Miss Sepulveda or whoever else.

But you've got to identify for me what it is you're looking for, I can not be guessing what you're looking for, and you've got to identify that, and you've got to identify it by indicating in response to such-and-such question or with regards to such subject we'd like such-and-such read back to us.

I can't just be saying, well, this is the answer, because you all have to make a decision as to the facts. And if you want somebody's testimony, Miss

Sepulveda or somebody else's portions read back, you're going to have to identify what portion you're looking for, and what you're asking for.

Other than that, it would be very difficult for me to be able to respond to that.

So if that's what you're looking for, you've got to identify it.

Please rise for the jury.

(Jury out.)

THE COURT: Mr. Leonard, did you have any problem with that?

MR. LEONARD: No, sir.

THE COURT: Did you, Mr. Villarreal?

MR. VILLARREAL: No, sir.

(3)

No. 91-700

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In the Supreme Court of the United States

OCTOBER TERM, 1991

TEODORA OLIVAREZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a conviction under the Bank Secrecy Act, 31 U.S.C. 5324, must be set aside when the jury returns a general verdict and the evidence is insufficient to support one of the means of committing the offense that was alleged in the indictment.

2. Whether the Sixth Amendment or the Due Process Clause required that the jury agree on the manner in which petitioner violated the Bank Secrecy Act.

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In the Supreme Court of the United States

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TEODORA OLIVAREZ, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A3-A12) is unreported, but the judgment is noted at 940 F.2d 656 (Table).

JURISDICTION

The judgment of the court of appeals was entered on July 25, 1991. A petition for rehearing was denied on August 21, 1991. Pet. App. A13. The petition for a writ of certiorari was filed on October 24, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of violating the Bank Secrecy Act by attempting to cause a bank to fail to file a currency transaction report, in violation of 31 U.S.C. 5324(1), and structuring a financial transaction to evade the requirement that the bank involved in the transaction file a currency transaction report, in violation of 31 U.S.C. 5324(3). She was sentenced to a prison term of a year and a day, to be followed by two years' supervised release. She was also ordered to pay a fine of $3000. The court of appeals affirmed. Pet. App. A3-A12; C.A. Record Excerpts Doc. 3.

1. On April 13, 1988, petitioner, accompanied by her mother, entered the First National Bank in Rio Grande City, Texas. Petitioner told Elmo Moreno, an officer of the bank, that she wanted to exchange some currency for currency of larger denominations without having the exchange reported in a currency transaction report (CTR). Petitioner knew at the time that CTRs were required for cash transactions in excess of $10,000. When Moreno mentioned the reporting requirement, petitioner offered to pay Moreno a "commission" if he agreed not to file a CTR. Moreno refused. Pet. App. A4; Tr. 19-25, 28, 33-34, 37, 57-61.

Petitioner and her mother then went to the teller station manned by Criseda Sepulveda. Petitioner told Sepulveda that she wanted to exchange $9000 in $5 bills for the same amount in $100 bills. After Sepulveda made the exchange, petitioner said that her mother also had $9000 to exchange. Petitioner's mother left the bank and returned with another $9000 in $5 bills. Sepulveda asked petitioner for identification, explaining that, because the total transaction

involved more than $10,000 in cash, a CTR would have to be filed. Petitioner claimed that she did not have any identification with her and that Moreno had approved her exchanging the cash without the filing of a CTR. Sepulveda then made the second exchange. After petitioner left the bank with the $18,000, Sepulveda filed a CTR using the name and address that petitioner had provided. Pet. App. A4-A5; Tr. 38-47, 51, 51-52, 55, 58, 90-91.

Petitioner was subsequently charged in a one-count indictment [1] with violating 31 U.S.C. 5324(1) and (3).[2]

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[1] The indictment read (C.A. Record Excerpts Doc. 2):

> On or about April 13, 1988, in the Southern District of Texas and within the jurisdiction of the Court, Defendant TEODORA OLIVAREZ did knowingly and willfully, for the purpose of evading the reporting requirements of Title 31, United States Code, Section 5313(a), cause and attempt to cause a domestic financial institution, to wit: First National Bank of Rio Grande City of Texas, to fail to file a report required under Section 5313(a) and did cause and attempt to cause, structure, attempt to structure, and assist in structuring a transaction with First National Bank of Rio Grande City of Texas by exchanging eighteen thousand ($18,000.00) dollars in five ($5.00) dollar United States currency bills for one hundred ($100.00) dollar bills by structuring the transaction by dividing the exchange into two exchanges of nine thousand ($9,000.00) dollars each.

[2] 31 U.S.C. 5324 provides:

> No person shall for the purpose of evading the reporting requirements of section 5313(a) with respect to such transaction—
>
> > (1) cause or attempt to cause a domestic financial institution to fail to file a report required under section 5313(a); [or]
>
> * * * * *

[Continued]

2. At trial, petitioner testified in her own defense. She admitted that when she went to the bank she knew that CTRs were required for cash transactions in excess of $10,000. Tr. 71. She also admitted telling Sepulveda that Moreno had approved petitioner's exchanging the $18,000 without the filing of a CTR. Petitioner claimed at trial that Moreno had told petitioner that no CTR was required if $9000 of the currency she sought to exchange belonged to her and the other $9000 belonged to her mother. Petitioner admitted that, although she and her mother had each carried half the money into the bank, petitioner was carrying the entire $18,000 in cash when she left the bank. Tr. 70-74, 75-79, 85-87.

At the charging conference, the prosecutor asked the court to instruct the jury on both subsections (1) and (3) of 31 U.S.C. 5324. Pet. App. A43. The court said it would instruct the jury that it could convict petitioner if it found her guilty under either subsection. *Id.* at A50-A51. Defense counsel objected that the government had to prove petitioner's guilt under both subsections "[s]ince they pled it in the conjunctive." *Id.* at A52-A53. The court overruled that objection. *Id.* at A55.

The court read the indictment and subsections (1) and (3) of 31 U.S.C. 5324 to the jury. Pet. App. A15-A16, A18-A20. The court instructed the jury that, to find petitioner guilty of the charges, it had to conclude beyond a reasonable doubt that, for the purpose of evading the reporting requirements of 31 U.S.C. 5313(a), petitioner had caused or attempted to

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[2] [Continued]

> (3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

cause a bank to fail to file a CTR under subsection (1), or that she had structured or attempted to structure a financial transaction with a bank under subsection (3). Pet. App. A22-A23. The court also instructed the jury that its verdict had to be unanimous. *Id.* at A29. The jury returned a general verdict of guilty. *Id.* at A10.

3. On appeal, petitioner conceded that the evidence was sufficient to show that she had violated subsection (3) of the statute. Pet. App. A6. Petitioner argued, however, that her conviction was invalid because the evidence was insufficient to support the allegation in the indictment that she had violated subsection (1) by both "caus[ing] and attempt[ing] to cause" the bank to fail to file a CTR. Petitioner asserted that, even though it was undisputed that the bank had filed a CTR, the jury was authorized under the instructions to find her guilty of causing the bank to fail to file a CTR. Petitioner contended that, because the jury might have convicted her on that theory despite the absence of evidence to support it, she had been denied due process.

The court of appeals affirmed. Pet. App. A3-A12. It held that there was no genuine possibility that the jury found that petitioner had caused the bank to fail to file a CTR, nor was there any reason to believe that the jury's verdict was less than unanimous. *Id.* at A9-A10.[3]

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[3] Petitioner also advanced several challenges to her sentence. Pet. C.A. Br. 13-20. The court of appeals rejected those challenges, Pet. App. A10-A12, and petitioner does not renew them in this Court.

ARGUMENT

The jury was instructed that it could find petitioner guilty of violating the Bank Secrecy Act if it found that she did any of the following: (1) caused the bank to fail to file a CTR; (2) attempted to cause the bank to do so; (3) structured a transaction to evade the requirement of filing a CTR; or (4) attempted to do so. Petitioner contends that, by submitting the case to the jury on each of those alternative theories, the district court violated her constitutional rights in two ways. She argues, first, that her due process rights were violated by the possibility that the verdict was based on the first theory, for which, she claims, the evidence was insufficient. That argument is foreclosed by this Court's decision in *Griffin* v. *United States*, No. 90-6352 (Dec. 3, 1991). She also argues that her due process and Sixth Amendment rights were violated by the possibility that the jury did not agree on the manner in which she violated the Bank Secrecy Act. Petitioner's second argument is foreclosed by this Court's decision in *Schad* v. *Arizona*, 111 S. Ct. 2491 (1991).

1. In *Griffin*, this Court held that the Due Process Clause does not require a guilty verdict on a multiple-object conspiracy to be set aside if the evidence is inadequate to support the verdict as to one of the objects. *Griffin*, slip op. 3-14. In so holding, the Court relied on the common-law rule "that a general jury verdict [is] valid so long as it [is] legally supportable on one of the submitted grounds." *Id.* at 3. That rule, the Court observed, had consistently been applied to uphold "a general jury verdict under a single count charging the commission of an offense by two or more means" when the evidence was insufficient to support one of the means by which the

offense was alleged to have been committed. *Id.* at 4 (emphasis omitted). As an example of the rule's application in that context, the Court in *Griffin*, slip op. 10, cited *Turner* v. *United States*, 396 U.S. 398 (1970), in which the Court stated that "when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, * * * the verdict stands if the evidence is sufficient with respect to any one of the acts charged." 396 U.S. at 420.

The common-law rule applied in *Griffin* and *Turner* disposes of petitioner's due process challenge. Petitioner contends that her conviction must be set aside because the jury might have based its verdict on a finding that she caused the bank to fail to file a CTR, notwithstanding the undisputed evidence that the bank *did* file a CTR. *Griffin* and *Turner* make clear, however, that due process does not require a guilty verdict to be set aside if one of the possible bases of conviction was "unsupported by sufficient evidence," *Griffin*, slip op. 10, as long as the evidence was sufficient with respect to one of the other possible bases of conviction, *Turner*, 396 U.S. at 420. Here, the evidence was sufficient to show that petitioner violated the Bank Secrecy Act in three of the four ways alleged in the indictment. The evidence showed that petitioner attempted to cause the bank to fail to file a CTR by offering to pay a bank officer a "commission" if he agreed not to file a CTR, and by falsely telling the teller that the bank officer had authorized her $18,000 transaction to be conducted without the filing of a CTR. As petitioner conceded below, the evidence was also sufficient to show that she had both structured and attempted to structure her transaction to evade the CTR filing requirement. Pet. App. A6.[4]

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[4] In her brief to the court of appeals, petitioner stated: "Viewed in a light most favorable to the jury's verdict, the

The court of appeals correctly held that petitioner was not entitled to have her conviction set aside simply because the government had not proved that she committed the offense charged by each and every means alleged in the indictment. Pet. App. A8-A9.

Petitioner relies (Pet. 33-39) on decisions in which the Court has set aside general verdicts when one of the possible bases of conviction was legally inadequate. See, *e.g.*, *Yates* v. *United States*, 354 U.S. 298 (1957); *Cramer* v. *United States*, 325 U.S. 1 (1945); *Stromberg* v. *California*, 283 U.S. 359, 367-370 (1931). In *Griffin*, however, the Court made clear that the *Yates* line of cases does not apply when one of the possible bases of conviction is challenged as factually unsupported. *Griffin*, slip op. 5-13. The Court explained that its decisions draw a "clear line" between verdicts challenged for "legal error" and those challenged for "insufficiency of proof." *Id.* at 12, 13. Petitioner's challenge falls into the second category; under *Griffin* and *Turner*, it therefore fails to make out a due process violation.[5]

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evidence was sufficient to sustain the jury's verdict as to a Subsec. (3) theory [i.e., carving up a single transaction into two less than $10,000.00 transactions]." Pet. C.A. Br. 7 (bracketed text in original). Petitioner now attempts to qualify that concession by pointing to a subsequent passage in her court of appeals brief regarding petitioner's "defensive testimony" to the effect that she did not intend to break the law. Pet. 12 (quoting Pet. C.A. Br. 8). Petitioner does not deny, however, that a rational jury could have disbelieved that testimony; indeed, her concession in the court of appeals implicitly recognized that the jury could rationally have concluded that she acted with the requisite *mens rea*.

[5] Petitioner's reliance on *Mills* v. *Maryland*, 486 U.S. 367 (1988), see Pet. 30-31, and *United States* v. *Meriwether*, 440 F.2d 753, 756-757 (5th Cir. 1971), see Pet. 20-21, is likewise

2. Petitioner next contends that her conviction must be reversed because it "cannot be said to be based on a jury verdict which is clearly unanimous" as to the way in which she violated the statute. Pet. 16-17 (emphasis omitted). Under *Schad* v. *Arizona*, 111 S. Ct. 2491 (1991), however, the jury was required to agree only that petitioner committed the offense charged; the jury was not required to agree on the means by which she committed that offense.

In *Schad*, this Court upheld against due process and Sixth Amendment challenges a state first-degree murder conviction. The trial court's instructions in that case did not require the jury to agree on whether the defendant committed premeditated murder or felony murder, the two theories on which the defendant was prosecuted. This Court framed the issue as whether the legislature could, consistently with due process, define first-degree murder as a single crime that included felony murder and premeditated murder. *Schad*, 111 S. Ct. at 2496 (plurality); *id.* at 2506 (Scalia, J., concurring in part and concurring in the

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misplaced. In *Mills*, the Court relied in part on *Yates* and *Stromberg* in vacating a death sentence based on a jury instruction that could have been construed to require jury unanimity in finding mitigating circumstances. *Mills* thus involved a sentence that may have reflected legal error; the decision has no bearing on the evidentiary challenge to the verdict in the present case. In *Meriwether*, the Fifth Circuit reversed a conviction for attempted income tax evasion because the district court committed legal error in instructing the jury as to one of the two methods of proof relied on by the government to establish the defendant's taxable income. By contrast, the jury in this case was properly instructed. The only asserted flaw in the case was a lack of evidence as to one of the means by which the crime was alleged to have been committed. *Meriwether* is thus inapposite here.

judgment).[6] Although the plurality and the concurring Justice in *Schad* approached that issue in different ways, both made clear that a legislature has broad discretion, when defining an offense, to provide that the offense may be committed by various means. *Id.* at 2500-2501 (plurality); *id.* at 2506 (Scalia, J., concurring). Both also agreed that due process analysis must comport with the "general rule that when a single crime can be committed in various ways, jurors need not agree upon the mode of commission." *Id.* at 2506 (Scalia, J., concurring); see also *id.* at 2497 (plurality). Thus, for example, when a defendant has been charged with murdering his victim by both shooting and drowning her, the jury need not agree on which of the two acts charged caused the death. *Id.* at 2497 (plurality); see also *id.* at 2506 (Scalia, J., concurring). Instead, the limits of due process are implicated only by, for example, an offense "so generic[ally]" defined "that any combination of jury findings of embezzlement, reckless driving, murder, burglary, tax evasion, or littering * * * would suffice for conviction." *Id.* at 2498 (plurality); see also *id.* at 2506 (Scalia, J., concurring) ("one can conceive of novel 'umbrella' crimes (a felony consisting of either robbery or failure to file a tax return) where permitting a 6-6 verdict would seem contrary to due process").

The statute under which petitioner was convicted does not bear any resemblance to the hypothetical

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[6] Although the defendant in *Schad* based his challenge on both due process and the Sixth Amendment, the Court held that the issue of whether a jury must agree on the manner in which an offense was committed is "properly characterized" as an issue of due process. 111 S. Ct. at 2498 n.5; see also *id.* at 2506 (Scalia, J., concurring).

statutes that the Court in *Schad* suggested would be impermissible. Petitioner was convicted under 31 U.S.C. 5324, which makes it a crime to cause, or attempt to cause, a bank to fail to file a CTR, or to structure, or attempt to structure, a transaction to evade the CTR filing requirement. Petitioner does not dispute that 31 U.S.C. 5324 defines only one offense, which may be committed in more than one way. With respect to the relationship among the various ways in which that offense can be committed, 31 U.S.C. 5324 is much closer to the examples cited in *Schad* as clearly permissible than it is to the examples of impermissible statutes discussed in *Schad*. Under *Schad*, therefore, petitioner's verdict-specificity argument must fail.

Petitioner's attempt to distinguish *Schad* is unpersuasive. Petitioner asserts that the reasoning of *Schad* is limited to convictions under statutes that define alternative means of satisfying the *mens rea* element of an offense. Pet. 30-31. *Schad* cannot be so limited. The Court in *Schad* premised its decision that "the jury need not agree as to * * * alternative means of satisfying the element of *mens rea*" on "the rule that the jury need not agree as to mere means of satisfying the *actus reus* element of an offense"; the Court could "see no reason * * * why" the same rule "should not apply equally" to both elements. 111 S. Ct. at 2497; see also *id.* at 2506 (Scalia, J., concurring). Thus, the fact that the present case involves a statute prescribing alternative *actus rei* places it squarely within the longstanding rule on which *Schad* was based.[7]

[7] All but one of the lower court decisions on which petitioner relies (Pet. 19-28) were decided before *Schad* and are no longer good law to the extent they are inconsistent with

Schad. Moreover, the continuing validity of those prior decisions is highly dubious because they follow *United States* v. *Gipson*, 553 F.2d 453 (5th Cir. 1977), a decision that was expressly disapproved by the plurality in *Schad*. See 111 S. Ct. at 2498-2499 & n.5 (also disapproving *United States* v. *Duncan*, 850 F.2d 1104 (6th Cir.), aff'd on remand, 881 F.2d 1077 (5th Cir. 1989) (Table), cert. denied, 493 U.S. 1025 (1990), cited in Pet. 21, and *United States* v. *Beros*, 833 F.2d 455 (3d Cir. 1987), cited in Pet. 25-28). Petitioner's reliance (Pet. 18-19) on the reference in *McKoy* v. *North Carolina*, 110 S. Ct. 1227, 1237 n.5 (1990) (Blackmun, J., concurring), to lower court decisions following *Gipson* is misplaced for the same reason. Finally, *United States* v. *Holley*, 942 F.2d 916 (5th Cir. 1991), the only post-*Schad* case cited by petitioner, Pet. 28-29, is distinguishable from the instant case. In *Holley*, the defendant was charged with two counts of perjury. Both counts alleged multiple false statements, and the government was required to prove dissimilar facts to show the knowing falsity of each statement. 942 F.2d at 928. Over the defendant's objection, the district court gave an instruction that the jury could reasonably have interpreted as allowing them to convict as long as each juror found at least one statement in each count was knowingly false. *Ibid*. Distinguishing *Schad*, the court in *Holley* reversed and remanded for a new trial, holding that each of the two counts in the indictment was duplicitous, *i.e.*, each count charged more than one offense, and that there was a reasonable possibility that the jury was not unanimous with respect to at least one statement in each count. *Id*. at 927-929. In the instant case, by contrast, the indictment charged a single offense, and petitioner accordingly has never challenged the indictment as duplicitous.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1991

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 312324 45210